

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GROUND ZERO FOUNDATION d/b/a ACADEMY
FOR CREATIVE ENRICHMENT
Respondent

and

Case 4–CA–245956

STEFANIE HAMILL, an Individual
Charging Party

David Rodriguez, Esq.,
for the General Counsel.
Ronald V. McGuckin, Esq.,
for Respondent (at trial).
Lauren P. DeLuca, Esq.
For Respondent (on brief).

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on January 9, 2020. The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by telling an employee that Respondent prohibits employees from discussing their wages with other employees and by discharging employee Stefanie Hamill for protected concerted activity, namely exchanging text messages of concerns about Respondent's wages and hours with other employees and bringing those concerns to the attention of management. Respondent filed an answer denying the essential allegations in the complaint. After the trial, the General Counsel and the Respondent filed briefs, which I have read and considered.

Based on the filed briefs and the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with an office and place of business in Bear, Delaware, operates a day-care center and summer camp for children. During a representative one-year period, Respondent derived gross revenues in excess of

\$250,000 and purchased and received, at its Bear, Delaware facility, products, goods, and materials valued in excess of \$5,000 directly from points outside Delaware. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Background

Respondent, also sometimes referred to as ACE, is owned by Finé Washington, the president of the Ground Zero Foundation. She has been its administrator since 1997. Assisting her in operating ACE since 1997 has been Jennifer Anne Porter, sometimes referred to as JP, who is the director of ACE. Both are admitted supervisors and agents of ACE within the meaning of the Act.

Stefanie Hamill was employed by Respondent as a counselor for its summer camp program from June 18, 2019 until her discharge on July 31, 2019. The summer camp that year began in early June and enrolled children up to teen-age years. Hamill, who was hired two weeks after the summer camp began, was one of 6 or 7 camp counselors and supervised a group of young boys from ages 6 to 11. On Wednesdays, the children would be taken on field trips with transportation provided by school bus. Tr. 14-16.

Hamill and the other counselors communicated with each other and with their supervisors, Washington and Porter, through their personal cellphones. They received messages from Washington and Porter on their cellphones. The counselors were also provided walkie-talkies, but, when they were called on them, they were told to respond by text from their personal cellphones. Tr. 17. Hamill's testimony in this respect was uncontradicted and supported by documentary evidence showing extensive work-time communications between employees, including with the participation of Washington. See Tr. 45-54, G.C. Exhs. 5 and 6.

Hamill was paid \$15 per hour and worked from 8 am to 5 pm, Monday through Friday. She punched in and out for work through the Respondent's computer system and was paid either bi-weekly or twice per month. Tr. 17-18, 20-21, 33, 102. Hamill and other counselors were required by Washington to report for work—and punch in—ten minutes early every day to be prepared to meet the children at 8 am. Tr. 25. But, despite punching in early, as directed, Hamill and the other counselors were paid only from 8 am. Tr. 26. The employees were also not paid for time worked after 5 pm even though they punched out after that time on occasion, especially after field trips. Tr. 33.¹

¹ The requirement that employees report for work 10 minutes early was admitted. Tr. 101.

Hamill's Concern about Rounded Hours for Employees

On Wednesday, July 31, Hamill first noticed that her hours were being rounded, which meant that, when she punched in before 8 am or after 5 pm, she was not paid for the extra time she worked. Tr. 18. Hamill first spoke to her co-workers about this pay and time issue at about 9:30 am on July 31, when she asked for help from one of her co-workers, Megan,² to download an application from Respondent's website so she could see her hours and upcoming paycheck. Hamill and Megan discussed the rounding of hours that applied to the pay of all the summer counselors. Megan acknowledged the problem and said that she had talked to Porter about it and that Porter was going to bring it to Washington's attention. Tr. 28-29. Hamill replied that the counselors should talk to Washington "as a group," but she would also raise the matter with Porter. Tr. 29-30.

Megan and Hamill spoke at Respondent's facility before leaving by bus for a field trip with the children to an arcade. Tr. 21-22, 28. Another employee, Suri, was part of the conversation about the rounding problem and Suri agreed it was wrong to round the hours. Tr. 24-25, 30. Hamill spoke to Megan again about the pay and time issue on July 31 when she arrived at the arcade after a bus trip of about an hour and a half or two hours. Tr. 28.

During the bus trip, which included not only the children but about 5 or 6 other counselors and Director Porter (Tr. 26-27, 32), Hamill exchanged text messages with Washington using her personal cellphone. Tr. 22-28. Those messages are reflected in G.C. Exh. 2, with time notations. Washington initiated the text conversation at 9:23 am by asking Hamill how many campers she had; they then texted about Washington's work concerns until 9:39. Then Hamill and Washington exchanged messages on how to access Respondent's payroll information beginning at 9:41 and continuing until about 10:00 am. At 10:06, Hamill complained about her pay, specifically raising the rounding issue, which she mentioned applied to "the other counselors as well. Especially if we are expected to be here 10 minutes early every day and sometimes the field trips run late." Washington responded at 10:10 am, stating: "I will check all of the above however, you were hired to work 8-5. You are paid for Friday meetings and Wednesday field trip but staying after 5 must be approved which I can tell you will not be because everyone manages to get those things done during their working hours." At 10:11, Hamill repeated the concerns about the counselors not being paid for the extra time again using the word "we" and specifically mentioning Megan in that context. Then, at 10:14, Washington again stated that she would not be paying for "something that can be done during the course of your day," adding that Hamill should "probably be active (sic) involved at whatever is going on on the bus but instead you are on your cell phone which I notice you do often." Hamill defended herself against those accusations stating that she was "checking on the kids," and continued to address the pay issue. The text exchanges about the pay and hours issue continued until about 10:26. Then, after a

² This is how her name is referenced in the transcript and how I will use it in this decision, even though in the documents reflecting the texts, her name is listed as "Meghan."

short hiatus, Hamill sent one last text to Washington at 11:06, briefly raising one more pay issue, to which there was no response.

While the bus was traveling to the arcade, at 10:07 am, Washington, who was at the facility, texted Porter, who was on the bus, about payment for the arcade games and lunch for the group. Tr. 140-142, R. Exh. 1. They later exchanged other texts about Hamill. At 10:19, Washington texted Porter as follows: "Houston we have a problem. If you were still here I'd fire Stefanie on the spot." There was no response from Porter, but, at 10:30, Washington texted as follows: "When you guys return I'm letting her go." Porter responded: "You should," but she testified that, at that point, she knew nothing about the contemporary texts between Washington and Hamill and thought Washington's statement referred to a matter involving Hamill that took place over a month before. Tr. 145-146. At 11:12, Washington texted Porter as follows: "She's still texting me!!!" R. Exh. 1.

As shown above, Porter was on the bus with Hamill, the other counselors and the children. She testified that she noticed Hamill texting, but said nothing to her, even after receiving the texts from Washington mentioned above. Porter testified that she was not paying particular attention to Hamill because she was interacting with children and counselors in activities, such as games and songs, throughout the hour and a half bus ride. Tr. 128-129, 134.

At the arcade, after lunch, Hamill approached Porter and asked if she could speak to her about her pay and Porter said yes. Hamill mentioned the problem of rounding hours. Porter replied that she was not fully "aware" of the situation, but that the policy may have been implemented because an employee was clocking in early "just to get like extra hours." Tr. 31-33.³

Later that same day, on the return bus trip from the arcade, Hamill engaged in a group chat, exchanging text messages with 3 fellow employees, Megan, Suri, and Vaughn, who were also on the bus and using their cellphones. Tr. 34-36, G.C. Exh. 3. Hamill initiated the chat at 4:09 pm by sending her co-workers a screen shot supporting her view that rounding hours was illegal. G.C. Exhs. 3, 4. Hamill also suggested raising the matter in the next weekly group meeting with the supervisors and staff the following Friday, specifically asking that others join her in raising the issue. Vaughn responded to Hamill's texts several times indicating his approval, although he suggested talking to Washington outside of the staff meeting. Tr. 37-38, G.C. Exh. 4.⁴

³ Porter confirmed that she had such a conversation with Hamill about the pay issue. Her testimony on this subject was brief and conclusory, essentially that she had nothing to do with pay and that Hamill should talk to Washington about the matter. Tr. 129-130, 132. Porter's testimony about the conversation was not as detailed as Hamill's. I therefore credit Hamill's version as set forth above.

⁴ The Vaughn reference above is to Vaughn Williams, another counselor and Washington's nephew.

Hamill's Discharge

When Hamill arrived at Respondent's facility at the end of the day on July 31, she clocked out and was told by Porter to meet with Washington in the latter's office, which she did at about 5:15 pm. Tr. 38-39. In the meeting, Washington told Hamill that her employment was not "going to work out because [she] was a bad apple spreading negativity to the other employees." Tr. 39. Washington told Hamill that she should have spoken to Washington first before raising the pay issue with other employees. Hamill responded that the issue of rounding of hours was actually raised by Megan and that was when she realized it was an issue of general application. Washington responded that nevertheless she should have talked to Washington first. Washington also said that Respondent's handbook rule said that employees were not allowed to "discuss wages" with each other. Tr. 39-40. Hamill responded that she never received a copy of the handbook, so she was not aware of that policy, to which Washington replied that it was a shame since Hamill had been hired after the orientation for the summer counselors occurred, at which time apparently the handbook was distributed. Tr. 40.

Hamill stated that employees should have been notified that the hours would be rounded and that they would only be paid from 8 am to 5 pm even though they worked before and after those times, adding that other employees agreed. She also complained that neither she nor Megan were notified of Respondent's apparent policy that overtime hours would be paid to the employees at the end of the summer. Hamill repeated that these matters "concerned everyone." Tr. 41-42. Washington's response was that Hamill should not have been texting while she was on the bus and she should have been supervising the children, to which Hamill responded that she was watching the children. Tr. 42. They then spoke about other discrepancies that Hamill had in her own pay, including hours that were not reflected and pay for a training practicum. Washington agreed to look into the matter and Hamill was eventually paid for those discrepancies. Tr. 42-44. The next day, August 1, Hamill sent a text to Washington requesting a discharge letter, but she never received one. Tr. 43-44, G.C. Exh. 2.

At 7:20 pm, on July 31, Hamill renewed her text discussion with her now-former co-employees. She stated that she was fired because "someone snitched about this group chat." She regretted that outcome especially since she was trying to stand up "for all of us" and the employees had supported her efforts about the rounded hours "to my face." G.C. Exh. 3. Vaughn Williams replied that he had talked to Washington, his aunt, about the group concerns. He mentioned discussing the group chats with Washington, stating as follows: "It was me for one. I asked about the law & asked why we didn't get paid for the extra work. I just let her know everybody (sic) concern." G.C. Exh. 3, Tr. 77-78.

Credibility

Much of the above is based on documentary evidence of text discussions. Most of the rest is based on Hamill's clear and detailed testimony, some of it uncontradicted and corroborated by documentary evidence. Hamill was a candid witness with a truthful

demeanor and her testimony survived extensive cross-examination. Overall, I found Hamill a very credible witness, particularly with respect to her testimony about her termination meeting with Washington.

Washington's direct testimony about the termination meeting, on the other hand, was nowhere near as detailed as Hamill's, but, significantly, it did not controvert most of Hamill's account. Washington's testimony about the meeting was almost perfunctory, although she did admit calling Hamill a "bad apple" because she was exchanging texts with other employees and "distracting them." Tr. 103.⁵

On cross-examination, however, Washington confirmed the substance of Hamill's account of the meeting, thus further enhancing Hamill's credibility. Washington explicitly testified that, when Hamill first came into the office, she told Hamill that "she was a bad apple" and "the bad apple spoils the bunch." Tr. 116. Washington also admitted that she told Hamill that she should have come to Washington about her pay concerns before talking to her fellow employees, who could not help her with her concerns. Tr. 116. This admission takes on more significance in light of Washington's further testimony, again on cross-examination, that her nephew, employee Vaughn Williams, came into her office, before the meeting with Hamill, and told Washington that Hamill had been texting her fellow employees, including Williams, on the return bus trip. Tr. 115-116. Porter, who testified after Washington, confirmed that she was in the office with Washington when Williams came in and showed Washington the group text messages between Hamill and the other employees. Tr. 138-140.

Washington's testimony on cross-examination also shows that she was not being fully candid when she testified on direct. For example, on direct, she simply mentioned that one person told her that the employees were texting and suggested only one, Hamill, was distracting the others (Tr. 103), but Washington did not identify who told her—Vaughn Williams, her nephew—until cross-examination. Indeed, even on cross, she did not fully explain what was reported to her by her nephew. Porter made it clear that Williams showed Washington the actual texts (Tr. 139), which is also supported by a text message from Williams to Hamill after Hamill was fired, as discussed above. And, on another occasion, when asked about her policy that employees should not be discussing their pay, Washington had to be prodded to answer fully only after being shown her pre-trial affidavit. See Tr. 113-115. On still another occasion, Washington's testimony on direct about having warned Hamill about her cellphone use 2 weeks after she was hired was shown not to have been true. Tr. 107-108. Accordingly, I discredit Washington's testimony as a general matter unless it is against interest or supported by other credible evidence.

⁵ I make no finding as to whether or not Washington also specifically accused Hamill of "starting drama" among the other employees, as Hamill testified. Tr. 39, 68. Washington denied that she would have used that "slang" term, although the question to which she responded was whether she told Hamill to stop "spreading drama." Tr. 104.

Respondent's Subsequent Explanations for the Discharge

On August 5, 2019, Hamill filed the charge in this case, which was then investigated by the Board. Washington thereafter provided two position statements to Board agents, explaining her reasons for Hamill's discharge. In the first one, dated August 21, she admitted that the reasons included not only Hamill's texts to her about the pay issue on the outgoing bus trip, but also Hamill's texts to other employees about that issue on the return trip. G.C. Exh. 7. Washington also stated that Hamill was discharged for "excessive use of her cell phone, neglect of campers in her charge [and] insubordination." Ibid. Washington expanded on the neglect issue in her second position statement, dated September 4, by detailing, as a reason for the discharge, an incident involving Hamill that occurred on a field trip on June 26, over a month before the discharge. G.C. Exh. 8. On that occasion, Hamill had lost a child in her care for a brief period, for which Hamill received an oral counseling. But there was no written documentation of it, and she was not otherwise disciplined. Indeed, that matter had not been raised in the July 31 termination meeting. Tr. 55-59.

Although Washington's position statement mentioned both the text discussion of pay between Hamill and herself and the text discussion of pay between the employees themselves, not specifically mentioned was Respondent's policy against discussing employee wages. That policy was, of course, mentioned to Hamill in the July 31 termination meeting, as set forth above. At the hearing in this case, Washington testified, as she stated in her pre-trial affidavit, that she told employees, at an orientation session in early June of 2019, that it was "unprofessional to discuss everyone's pay." Tr. 115, G.C. Exh. 11, p. 2. Hamill did not attend the orientation session because she was hired later in the month. Washington further testified that she had a written policy stating that "employees are not to discuss their wages during working hours." Tr. 105. I was advised that such a written policy was part of the Respondent's handbook. Tr. 115-116. I was later told that the handbook was contained in G.C. Exh. 8, one of Washington's detailed position statements (Tr. 159-160). But that document, which includes only what appears to be a 3-non-consecutive-page excerpt from something entitled "standard of conduct," does not say anything about such a policy. See pp. 16-18 of G.C. Exh. 8.

Respondent's Cellphone Policy

Another of Respondent's policies that does appear in the standard of conduct portion of G.C. Exh. 8 is that dealing with telephones and cellphones. It is clear that the concern is with excessive use of such devices, as Washington specifically mentioned in her position statement. Indeed, the standard of conduct states that among the behaviors prohibited and subject to discipline is "[e]xcessive personal telephone calls." Later, in a section without context in the exhibit, the following language appears: "Although employees may use their cell phones for curriculum activities involving the children during the summer, employees may not utilize their cell phones or landlines for personal use while they are scheduled to work. Personal phone usage while working poses a potential safety risk as the children are not fully supervised." G.C. Exh. 8 at p.

18. Thus, the prohibition was not only for excessive cell phone use, but personal use that interfered with childcare.⁶

5 The evidence in this case demonstrates that cellphones were used extensively by employees and supervisors alike to communicate during working time and that was permitted. Hamill credibly testified that, at one of the Friday staff meetings, employees were told that it was impermissible for employees to use cellphones while working, but that ban was never enforced. Tr. 45-54. As shown above, Hamill's testimony was supported by documentary evidence that describes numerous communications during
10 work time, many initiated by Washington. G.C. Exhs. 5 and 6. Indeed, the documentary evidence shows that, during one particular bus field trip with campers about three weeks before Hamill was fired, the counselors participated in a cellphone texting game on work time that had nothing to do with work. The game, which was initiated by Washington, involved naming songs and lyrics. It lasted some 47 minutes
15 and deteriorated into jokes and vulgarity with shots of sleeping campers. G.C. Exh. 6, Tr. 46-47. Hamill credibly testified (Tr. 70) that the text game did not involve the children. This is confirmed by the exhibit itself, which lists the text exchanges in their entirety. No one was punished for this conduct (Tr. 54).⁷

20 Porter also testified about Respondent's concern with cellphone use—more particularly, "overuse." Tr. 135. But she made it clear that the concern was a general one, that is, cellphone use by all employees. Porter testified that she never singled out Hamill on this matter. She only raised the matter with the entire group of counselors during Friday staff meetings. Tr. 131-133. Indeed, Porter, who said she directly
25 supervised Hamill during her entire employment with Respondent (Tr. 132), testified twice that she never witnessed Hamill "overuse her telephone." Tr. 133, 134.⁸

⁶ Excessive cellphone use for personal business that interferes with childcare is also the concern of the State of Delaware, as reflected in its regulations dealing with "Early Care and Education and School Age Centers." Those regulations, which were admitted in evidence as Respondent's Exhibit 2 (See Tr. 159), provide that "[s]taff members providing care for children may not be given other duties or participate in personal activities, such as using a cell phone that would interfere with providing care to children."

⁷ I discredit Washington's testimony (Tr. 105) that the game was intended for the enjoyment of the children. The text exchanges in the exhibit do not support, and indeed refute, that view. Moreover, Washington gave a tortured and self-serving explanation of why she was not responsible for the text exchanges, even though her active participation is clear. Her incredible testimony in this respect simply reinforces my earlier assessment that she was a wholly unreliable witness.

⁸ Porter specifically testified that her staff meeting concerns were "because people were overusing [their cellphones]." Tr. 135. But she later added that her concerns were about using "cell phones for any reason at all" and she suggested that supervisors did not communicate with employees by cellphone during working hours when the counselors are "supposed to be watching the children." Tr. 135-136. I find this latter testimony confusing and even contradictory, in light of the overwhelming evidence of cellphone use during working hours between employees themselves and with supervisors, as well as the assertion in Respondent's position statement that Hamill was fired for "excessive" cellphone use. Therefore, I do not credit the latter part of Porter's testimony. My sense is that the concern was with overuse as Porter clearly stated earlier in her testimony. That was also the thrust of Washington's testimony that employees could text about private employment questions and the explicit reference in the

Summary

The above shows that Respondent's cellphone policy was ambiguous or inconsistent at best, and, more importantly, whatever it was, it was not enforced. Significantly, Hamill's cellphone use on July 31 involved employment related matters and thus did not controvert Respondent's policy on that account. Indeed, Washington admitted in her position statement that it was perfectly proper for employees to text about private employment questions, a view she confirmed on cross-examination. G.C. Exh. 8, Tr. 117-118.

B. Discussion and Analysis

The Prohibition Against Discussion of Wages

The General Counsel alleges that Washington told Hamill that Respondent prohibits employees from discussing their wages with other employees. That would be a violation of Section 8(a)(1) of the Act because such discussions among employees is a protected concerted activity under Section 7 of the Act, which employers cannot prohibit. *Alternative Energy Applications, Inc.*, 361 NLRB 1203 (2014).

I find, as Hamill's credible testimony clearly shows, that, in the July 31 termination meeting, Washington told Hamill that there was a handbook policy that "co-workers were not allowed to discuss wages with other co-workers." This was a flat-out prohibition with no caveats or limitations. Indeed, Hamill's testimony in this respect is uncontradicted. Washington did not deny saying what Hamill testified she said at the meeting, although, at one point, she was asked by her counsel whether she has a "written or unwritten policy that employees are not to discuss their wages." Washington responded that there is a written policy that "they are not to discuss their wages during work hours." Tr. 105-106. In the factual statement, I have commented about the absence of such a policy in the record. But whether there was such a policy in the handbook or what specifically it provided, or even whether or not it was enforced, is not relevant to the violation alleged here. The violation alleged here is the statement made by Washington at the termination meeting. And that statement itself was clearly a violation of Section 8(a)(1) under the authority of *Alternative Energy Applications*, set forth above. See also *Pruitthealth Veterans Services-North Carolina, Inc.*, 369 NLRB No. 22 (2020).⁹

The Discharge of Employee Hamill

It is settled that an employer violates Section 8(a)(1) of the Act if it disciplines or discharges an employee because of its belief that that employee engaged in protected concerted activity within the meaning of Section 7 of the Act. *Alternative Energy*, cited above, 361 NLRB at 1205-1207; and *Marburn Academy Inc.*, 368 NLRB No. 38 (2019).

standard of conduct to "excessive" telephone use.

⁹ Any rule prohibiting the discussion of wages among employees would itself be unlawful. See *La Specialty Produce Co.*, 368 NLRB No. 93, slip op. 3, fn. 4 (2019).

The first question to be answered is whether the employee did engage in protected concerted activity. If that is answered in the affirmative, the second question to be answered is whether the employer did indeed discharge the employee for that unlawful reason. *Ibid.*

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Hamill was engaged in protected concerted activity

10 In *Marburn Academy*, cited above, the Board, with reference to numerous supporting authorities, made clear that Section 7 of the Act guarantees the right of employees to band together to seek to improve their hours, pay and working conditions for “mutual aid and protection.” The reach of Section 7’s protected concerted activity includes initial steps by one employee to solicit the help of fellow employees on such group concerns and to bring those concerns to the attention of management. See 368 NLRB No. 38 at slip op. 10. This is what Hamill was doing both when she was speaking 15 with fellow employees before the bus trip and in text message exchanges on the outgoing and the return bus trips. The concerns she raised were clearly group concerns since the rounding of hours applied to all employees. In her text exchanges with Washington, Hamill specifically mentioned that the rounded hours applied to the “other counselors” and repeatedly used the word “we” when mentioning the problem. She also 20 enlisted the support of the other counselors and suggested they raise the matter in the next staff meeting. And at least one employee gave Hamill his explicit support in advancing those concerns. Fellow employee Williams clearly agreed that the rounding issue was “everybody (sic) concern,” which he later mentioned to Washington. There is thus no doubt that Hamill was engaged in protected concerted activity on July 31, 2019, 25 immediately before she was fired.

In its brief (Br. 15-16), Respondent cherry picks some of Hamill’s text messages to urge that her concerns simply amounted to a personal gripe, which defeats a finding of protected concerted activity. But this was not strictly or only a personal gripe on 30 Hamill’s part. The rounded hours problem applied to all employees. That Hamill also complained about other discrepancies in her pay that did not directly involve the rounded hours complaint does not defeat the concerted nature of the rounded hours concern, which she pressed on her fellow employees and which she vigorously pursued with Washington. It is clear that, even if the group concern involves a selfish motive on 35 the part of the employee or employees advancing it, the group concern remains protected because it involves mutual aid and protection. *Marburn Academy*, cited above, 368 NLRB No. 38, slip op. 11. See also *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 154 (2014). In that case, the Board also noted that “where an employee’s objective in taking certain action may be mixed, and one supports a finding 40 of concertedness, [the Board] may not ignore it in favor of one that does not.” *Id.* at fn. 11, quoting from *Circle K Corp.*, 305 NLRB 932, 933 (1991), *enfd. mem.* 989 F.2d 498 (6th Cir. 1993).¹⁰

¹⁰ Respondent’s reliance (Br. 16) on *NLRB v. Deauville Hotel*, 751 F.2d 1562 (11th Cir. 1985) to support a contrary position is misplaced and the differences between that case and this one illustrate why Hamill was not solely advancing a personal gripe. The employee in *Deauville* was reinstated to a different position after the conclusion of a strike and he repeatedly complained about his new position not

Hamill was discharged for engaging in protected concerted activity

This part of the case basically presents an issue of motivation. Such cases are analyzed under the dual motive causation test set forth in *Wright Line*, 251 NLRB 1083 (1980), enf'd on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See also *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. 7 (2019). Under *Wright Line*, the General Counsel must satisfy an initial burden of showing by a preponderance of the evidence that the employee's protected activity was a motivating factor in a respondent's adverse action. If the General Counsel meets that initial burden, the burden shifts to the respondent to show that it would have taken the same action even absent the employee's protected activity. The respondent does not meet its burden merely by showing that it had a legitimate reason for its action; it must persuasively demonstrate that it would have taken the same action in the absence of the protected conduct. But if the respondent's proffered reasons are pretextual—either false or not actually relied on—the respondent fails by definition to meet its burden of showing it would have taken the action for those reasons absent the protected activity. *Hard Hat Services, LLC*, 366 NLRB No. 106, slip op. 7 (2018), and cases there cited.

A showing of pretext also supports the initial showing of discrimination. See *Wright Line*, supra, 251 NLRB at 1088 n.12, citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) (where a respondent's reasons are false, it can be inferred "that the [real] motive is one that the [respondent] desires to conceal—an unlawful motive—at least where . . . the surrounding facts tend to reinforce that inference."). In this respect, it is clear that a trier-of-fact may not only reject a witness's testimony about his or her reasons for an adverse action, but also find that the truth is the opposite of that testimony. *Hard Hat Services, cited above*, 366 NLRB No. 106, slip op. 7, citing *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).

Applying the above principles, I find that Respondent discharged Hamill for engaging in protected concerted activity—discussing group concerns about rounding hours of work with fellow employees and bringing those group concerns to the attention of management.

The evidence of unlawful motivation is overwhelming. In the termination meeting, Washington told Hamill that it was improper for employees to "discuss wages," which is exactly what Hamill was doing during the bus trip earlier the same day that got her fired. That statement was an independent unfair labor practice that also basically amounted to an admission of the unlawful reason for the discharge. Washington's reference in the termination meeting to Hamill being a "bad apple," is further proof that

only to his employer but also to his fellow employees. *Id.* at 1570. Thus, unlike Hamill, that employee's conduct did not look to initiate, induce or prepare for group action, nor did it have a relationship to group action in the interest of anyone but himself. Thus, the court properly viewed the employee as "merely demonstrating a bad attitude about his job and disrupting the workplace with his personal gripes." *Id.* at 1571.

the discharge was because Hamill, in Washington's view, was infecting the other employees in involving them in her objection to the rounding of hours—a clear protected concerted activity. In fact, Washington herself literally spelled out the meaning of the well-known adage by testifying that she added to her bad apple statement to Hamill that bad apples “spoil the bunch.” Tr. 116. Moreover, Washington admitted in her first position statement that she fired Hamill for her text exchanges, including those with her fellow employees on the return bus trip. She obviously learned of the latter from Vaughn Williams immediately prior to the termination meeting. Indeed, in the termination meeting, Washington made clear that Hamill's involvement of the other employees in the rounding of hours concern was her main objection when she told Hamill she should have come to Washington first before involving them in the matter.

The above makes clear that Washington objected to the content of the Hamill texts and her involvement of other employees rather than the act of texting itself. As shown in the factual statement, Respondent's policy on the latter, such as it was, was not enforced. The record evidence is clear that cellphone use was prevalent during work time among supervisors and counselors, including during a particular bus trip described above 3 weeks before Hamill's discharge. That involved a game engaged in by counselors and supervisors, including Washington, that had nothing to do with work and for which no one was disciplined. In contrast, Hamill's July 31 texts about the rounding of hours fit squarely in what Washington admitted was permissible—employee texts about employment questions. Yet she, and she alone, was fired for the July 31 texts and the others who participated in the text exchanges on the return bus trip were not. That includes Williams (Tr. 78-79), even though he had been issued a written employee counseling memorandum on June 27, just a month before, for “using his cell phone to post pictures onto social media.” G.C. Exh. 10, Tr. 84. Such disparate treatment strengthens the finding of discrimination.

Respondent asserts (Br. 19) that Washington did not know about the concerted protected activity when she made her decision to discharge Hamill at 10:30 am on July 31, referring to the text exchange between her and Porter in R. Exh. 2. But that is not accurate since that text exchange occurred shortly after Hamill texted Washington that the rounding of hours applied to all the counselors, specifically mentioning discussion of the matter with Megan. See G.C. Exh. 2. Thus, even focusing only on the text mentioned by Respondent in its brief, the timing of the decision strongly supports the inference of discrimination. But the assertion of lack of knowledge is refuted by Washington's admission in her first position statement that she fired Hamill not only for her texts on the outgoing bus trip but also for her texts with fellow employees on the return bus trip. Washington, of course, learned of the latter from her nephew, Vaughn Williams, immediately before she discharged Hamill. And, in the termination meeting, Washington clearly mentioned Hamill's involvement of other employees in the matter.

Also supportive of the finding of unlawful motivation is the fact that, as Washington admitted, discharges of any kind are unusual in Respondent's operations. Tr. 117. The only documented discharge of an employee in the over 20 years of Respondent's existence is an April 1997 discharge for insubordination because an

employee said a supervisor should “bite her butt.” G.C. Exh. 10, Tr. 84. Further support comes from the fact that, in her second position statement, Washington felt the need to add an additional reason for the Hamill discharge. In that document, Washington added as a reason the field trip incident involving Hamill 3 weeks before the discharge, for which Hamill was not issued a disciplinary notice and which was not even mentioned in the termination meeting. Offering such an inconsistent or shifting reason for a discharge permits the inference, which I make, that the real reason was one that the employer means to conceal. See *Resolute Realty Management Corp.*, 297 NLRB 679, 687 (1990). It also permits the inference, which I also make, that the reason offered was a pretext. See *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 509 (2007).

The other assertedly non-discriminatory reasons offered by Washington in her first position statement—excessive cellphone use; neglect of campers; and insubordination—are also pretexts.

First of all, the charge of excessive cellphone use was directly refuted by Porter, who testified that she never singled out Hamill for this alleged offense. Moreover, as discussed above, the cellphone policy, whatever it was, was not enforced. Hamill did not violate it in any event because her text involved an employment matter, which Washington acknowledged was permissible. Finally, as shown above, Hamill was treated in a disparate manner as to cellphone use. Thus, the reason given was a pretext. See *Pontiac Care & Rehabilitation Center*, 344 NLRB 761, 767 (2005).

Second, there is no evidence that Hamill’s cellphone use on the July 31 bus trips involved a neglect of campers. Washington, of course, was not on the bus so she had no first-hand knowledge of what happened in that respect. However, Hamill’s uncontradicted testimony refutes the charge. According to Hamill, there was no problem with the children in her care on the outgoing bus trip when she and Washington were texting because they were “talking quietly,” and Hamill was “keeping an eye on them.” Tr. 26. Likewise, on the return bus trip, when Hamill exchanged texts with fellow employees, there was no problem with the children in her care. Tr. 38. There were other counselors on the bus, so the children were not supervised by Hamill alone. In fact, Porter was also on the bus during both trips and she did not support Washington’s “neglect of campers” assertion. On the outgoing trip, Porter was herself busy interacting with the children and she voiced no concern about Hamill’s or anyone else’s inattention to the children on either trip. In short, Respondent offered no evidence that Hamill was actually inattentive to the children or even that there was a problem with the children on either trip. Accordingly, this too was a pretext.¹¹

¹¹ For the same reasons set forth above, contrary to Respondent’s contention in its brief (Br.17-19), Hamill did not lose the protection of the Act for this alleged, but unproven, act of misconduct. Nor did any of the other reasons found herein to be pretextual, that is, not the real reasons, amount to the kind of “egregious, offensive, unlawful or otherwise improper” conduct that Respondent alleges (Br. 17) removed Hamill’s texting about the rounding of hours problem from the protection of the Act.

Finally, the charge of insubordination is absurd. Hamill's protected activity was nothing like the conduct of Respondent's former employee who was fired for insubordination after insulting her supervisor. The text exchanges do not show that Hamill insulted Washington or treated her in any way but with respect. In fact, it was Washington who injected a certain nastiness to the exchanges. Nor do the text exchanges show a direct order to stop texting or a refusal to do so. Indeed, it appears that it was Hamill, not Washington, who suggested that they should talk further about the rounded hours issue "in person." Washington seems to think that an employee who does not cease her protected activity when the employer tells her to stop is guilty of insubordination. That is not so. Long ago, the Supreme Court made clear that employees could not be prohibited from engaging in a protected walkout to protest a lack of heat in the workplace simply because the employer had a rule that banned employees from leaving their workstations without the permission of their foreman. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). Finally, Washington did not mention insubordination in the termination meeting, thus further showing that this was not an actual reason for the termination. See *Tschiggfrie*, cited above, 368 NLRB No. 120 at slip op. 7.¹²

For the above reasons, including my earlier assessment of Washington's credibility, I specifically discredit Washington's testimony denying that she fired Hamill for "discussing her working conditions." Tr. 106. In all the circumstances, I find that her testimony and her position statements not only advanced pretextual reasons for the discharge, but also confirm Washington's overall lack of credibility. That, in turn, convinces me that the truth is the opposite of Washington's testimony, that is, the reason for the discharge was really the unlawful one discussed above.

Accordingly, I find that the discharge of Hamill for engaging in protected concerted activity violated Section 8(a) (1) of the Act.

¹² Respondent's attempt (Br. 24-25) to equate Hamill's situation with that of the employee discharged for insubordination some 20 years before is way off the mark. First of all, there was no testimony on the earlier incident and the only direct evidence on the matter was the contemporary document, a handwritten note describing the incident, which was not discussed by Respondent in its brief. That document (G.C. Exh. 10), admitted into evidence by stipulation, makes clear that that discharge was for insubordination only, even though the background included use of a land line phone for a personal call during work time the day before. The discharge came the next day after the employee was confronted with the "bite your butt" comment she made about her supervisor, which she did not retract. Instead, Respondent cites Washington's position statement (G.C. Exh. 8, p. 2) and her affidavit (G.C. Exh. 11, p. 6) as substantive evidence, even though those assertions amount to inadmissible hearsay. The affidavit was admitted for a different and very limited purpose (Tr. 113-115, 120). But elsewhere the affidavit erroneously states that the employee was fired for "refusing to hang up the phone." The position statement does mention that the discharge was for insubordination, without going into detail, but also erroneously mentions that it was for "excessive phone usage." Not only are these assertions unreliable as evidence, but they come from a discredited witness, who neither testified about these matters nor subjected herself to cross-examination on them. In any event, even assuming that the telephone use in the prior incident had something to do with the discharge, it is qualitatively different from Hamill's use of her cellphone, which did not involve a personal call, but rather an employment matter that Washington conceded was permissible.

Conclusions of Law

1. By telling employee Stefanie Hamill that employees were not permitted to discuss wages with each other, Respondent violated Section 8(a)(1) of the Act.

2. By discharging employee Stefanie Hamill because of her protected concerted activities, Respondent violated Section 8(a) (1) of the Act.

3. The above violations constitute unfair labor practices within the meaning of the Act.

Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend and order that it must be ordered to cease and desist from its unlawful conduct and take certain affirmative action designed to effectuate the policies of the Act, including the posting of an appropriate notice.¹³

Since Respondent unlawfully discharged Stefanie Hamill, I shall also recommend that it must offer her reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position without prejudice to her seniority of any other rights or privileges previously enjoyed. The Respondent shall also make Hamill whole for any loss of earnings and other benefits she may have suffered as a result of the unlawful discrimination against her. The make-whole remedy shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in pertinent part 859 F.3d 23 (D.C. Cir. 2017), Respondent shall compensate Ramos for search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings. Respondent shall also compensate Hamill for the adverse tax consequences, if any, of receiving a lump sum back pay award and file a report allocating backpay to appropriate years in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).¹⁴

The General Counsel also asks (Br. 32) that the usual expungement remedy be extended to the withdrawal of a letter Washington sent to the Delaware Department of

¹³ The General Counsel asks (Br. 33) for a notice mailing remedy because of the seasonal nature of the counselors' jobs. I do not find that an appropriate remedy, but I shall order that the usual 60-day posting period begin at the start of the next summer season when counselors are hired.

¹⁴ The above is the traditional remedy for an unlawful discharge. The reference to immediate reinstatement in the remedy, order and notice means, in the circumstances of this case, to the next available summer camp counselor position. There is testimony that Respondent hires counselors only for the summer, but there is also testimony that some counselors, including Megan and Vaughn Williams, were rehired for several consecutive summers.

Labor notifying it of Hamill's discharge assertedly for neglect of children (G.C. Exh. 8, p. 28), which I have found to be a pretext. I find that an appropriate remedy to protect Hamill from additional adverse effects of her unlawful discharge.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended¹⁵

ORDER

Respondent, Ground Zero Foundation d/b/a Academy for Creative Enrichment, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Telling employees that they are not permitted to discuss wages with each other.

(b) Discharging or otherwise disciplining employees for engaging in protected concerted activity under Section 7 of the Act.

(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this order, offer Stefanie Hamill reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.

(b) Make Stefanie Hamill whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision.

(c) Compensate Stefanie Hamill for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Within 14 days from the date of this order, remove from its files any reference to the unlawful discharge of Stefanie Hamill, and, within 3 days thereafter, notify her in writing that it has been done and that the unlawful action will not be used against her in any way.

¹⁵ If no exceptions are filed, as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.

(e) Within 14 days from the date of this order, notify the State of Delaware Department of Labor that its earlier notification of Stefanie Hamill's discharge listed an erroneous reason and that the real reason was an unlawful one as found by the Board. The required notification is set out in a letter attached to this decision as Appendix A.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order

(g) Within 14 days after appropriate notification by the Region, post, at Its Bear, Delaware facility, copies of the attached notice marked "Appendix B."¹⁶ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days, beginning at the start of the next summer seasonal hire of camp counselors, in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 31, 2019.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated at Washington, D.C., March 25, 2020.



Robert A. Giannasi
Administrative Law Judge

¹⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A

To Delaware State Department of Labor

Dear Sir or Madam:

On August 1, 2019, on behalf of Academy for Creative Enrichment, I submitted a service letter under 19 Del. C. Sec. 708, stating that Stefanie Hamill was discharged from her employment for neglect of children. I would like to withdraw that letter because, after litigation, the National Labor Relations Board found that the reason given was a pretext and that her discharge violated Federal law. I enclose a copy of the relevant Board decision

Finé Washington
Academy for Creative Enrichment

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.
Choose representatives to bargain with us or your behalf.
Act together with other employees for your
benefit and protection
Choose not to engage in any of these
protected activities.

WE WILL NOT tell employees that they are not permitted to discuss wages with each other.

WE WILL NOT discharge or otherwise discipline employees because of their protected concerted activities under Section 7 of the Act.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL offer Stefanie Hamill immediate and full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.

WE WILL make Stefanie Hamill whole, with interest, for any loss of earnings and other benefits suffered as a result of our discrimination against her, less net interim earnings, plus reasonable search-for-work and interim employment expenses.

WE WILL remove from our files any references to the unlawful action taken against Stefanie Hamill, notify her that this has been done, and that that unlawful action will not be used against her in any way.

WE WILL notify the State of Delaware Department of Labor that our earlier notification of Stefanie Hamill's discharge listed an erroneous reason for the discharge and that the real reason was an unlawful one as found by the National Labor Relations Board.

WE WILL compensate Stefanie Hamill for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

GROUND ZERO FOUNDATION d/b/a
ACADEMY FOR CREATIVE ENRICHMENT
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov

Wanamaker Building, 100 Penn Square, East, Suite 400, Philadelphia, PA 19007
(215) 597-7601 Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/04-CA-245956 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OF COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (215) 597-5354.